B. TIME, PLACE, AND REGULATION OF ELECTIONS

§ 5. In General; Federal and State Power

The U.S. Constitution delineates the respective areas of state and federal regulatory power over congressional elections in the following language:

> *The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the places of chusing Senators.*[18]

This provision of the Constitution was adopted in order to furnish a flexible scheme of regulatory authority over congressional elections, to depend upon harmony and comity between the individual states and the Congress.[19] The discretionary power vested in Congress to supersede election regulations made by the states has only been exercised where necessity required it to protect constitutional rights or to remedy substantial inconsistencies among congressional elections in the several states.[20]

Although Congress has the absolute power, as affirmed by numerous decisions of the Supreme

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18. U.S. Const. art. I, § 4, clause 1. See generally *House Rules and Manual* §§ 42–44 (1973).

19. See the Federalist No. 59 (Hamilton): "It will not be alleged that an election law could have been framed and inserted in the Constitution which would have been always applicable to every probable change in the situation of the country; and it will therefore not be denied that a discretionary power over elections ought to exist somewhere. It will, I presume, be as readily conceded that there were only three ways in which this power could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the state legislatures, or primarily in the latter and ultimately in the former. The last mode has, with reason, been preferred by the convention. They have submitted the regulation of elections for the federal government, in the first instance, to the local administrations, which in ordinary cases and when no improper views prevail, may be both more convenient and more satisfactory; but they have reserved to the national authority a right to interpose whenever extraordinary circumstances might render that interposition necessary to its safety."

20. Congress has acted to unify the time of congressional elections, 2 USC §§ 1, 7, and the manner of balloting, 2 USC § 9.

For the general relationship of state power to congressional power over elections, see *Ex parte Siebold*, 100 U.S. 383 (1880).

Court, to fashion a complete code for congressional elections,(1) congressional regulation has been directed largely towards the failure of the states to ensure the regularity of elections under their own state laws and to the failure of the states to adequately protect the voting rights of all citizens entitled to vote.(2) The actual mechanism of holding congressional elections is traditionally left by Congress to the province of the states. In judging the elections and returns of its Members, the House has usually deferred to state law on the procedure of elections,(3) on recount remedies and the validity of ballots,(4) and on the functions of state election officials.(5)

The Constitution not only grants the states power over election procedure, but also delegates to them the power to prescribe the qualifications for voters, who must possess those qualifications requisite to vote for the most numerous branch of the state legislature.(6) However, variances among the states in regard to the qualifications of electors have been greatly diminished through constitutional amendment, through judicial decisions, and through federal legislation.(7) The franchise has been extended to all citizens, male or female, regardless of color, race, creed, or wealth, who are at least 18 years of age. The right to vote in primaries which are an integral part of the election process, to register as voters, and to vote without discrimination, intimidation or threats, have been ensured by civil rights legislation spanning from 1870 to the present. The courts have taken an active role in voiding state statutes and practices which deny the

1. "It cannot be doubted that these comprehensive words [art. I, § 4] embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and candidates, and making a publication of election returns; in short, to enact numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Smiley* v *Holme*, 825 U.S. 355, 366 (1932).

Congress as judge of Members' qualifications, Ch. 7, supra.

2. See § 6, infra. Congress has also legislated extensively in the field of campaign practices (see §§ 10 et seq., infra).

3. See § 7, infra.

4. See § 8, infra.

5. See §§ 7, 8, infra.

6. U.S. Const. art. I, § 2, clause 1. See generally *House Rules and Manual* §§ 7, 8 (1973).

7. See generally § 6, infra.

right to vote or prescribe unreasonable and discriminatory qualifications. Thus, although earlier judicial decisions suggested that Congress had no right to interfere with state regulation of state elections,[8] Congress in the Voting Rights Acts of 1964 and 1965 enacted regulations applicable to elections for both state and federal officials.[9] The Supreme Court later upheld Congress' power under the 14th and 15th amendments to the Constitution to act to protect voters from state interference in state elections.[10]

The ultimate validity of elections rests on determinations by the House and Senate as final judges of the elections and returns of their respective Members,[11] and the temporary denial of a state to a seat in the House or Senate is a necessary consequence of Congress' power to judge such elections.[12] The House and the Senate construe the effect of state and federal legislation on elections both through the election contest process[13] and through independent investigations of the regularity and propriety of individual congressional elections.[14]

Although there is no constitutional provision for representation in the national legislature by territories of the United States or by the seat of government, Congress has by statute extended nonvoting representation in the House to those entities.[15] Where popular elections are held in territories or in the seat of government, limited power is delegated by Congress to the governing bodies thereof to regulate the conduct of such elections. Election contests challenging the regularity of elections or of results may be instituted in regard to territorial elections as well as to congressional elections within the states.[16]

Jurisdiction of States

§ 5.1 The Senate delayed judging an election pending a de-

8. See *Lackey* v *United States,* 107 F 114 (6th Cir. 1901), cert. denied, 181 U.S. 621; *United States* v *Belvin,* 46 F 381 (Cir. Ct. Va. 1891); *Ex parte Perkins,* 29 F 900 (Cir. Ct. Ind. 1887).

9. Pub. L. No. 88–352, 78 Stat. 241 (1964); Pub. L. No. 89–110, 79 Stat. 437 (1965).

10. *South Carolina* v *Katzenbach,* 383 U.S. 301 (1966); *Katzenbach* v *Morgan,* 384 U.S. 641 (1966).

11. U.S. Const. art. I, § 5, clause 1.

12. See *Barry* v *United States ex rel. Cunningham,* 279 U.S. 597 (1929).

13. See §§ 5.4, 5.5, infra. See also Ch. 9, infra.

14. See § 14, infra, for committee investigations of elections, and Ch. 15, infra, for the investigative power of the House in general.

15. For Delegates and the Resident Commissioner, see Ch. 7, supra.

16. See § 5.5, infra.
Contested election statutes, procedures and cases, see Ch. 9, infra.

termination by the U.S. Supreme Court that a state could order an election recount without violating the Senate's sole authority as the judge of the elections and returns of its Members.

On Jan. 21, 1971, the Senate ordered "that the oath may be administered to Mr. Hartke, of Indiana, without prejudice to the outcome of an appeal pending in the Supreme Court of the United States, and without prejudice to the outcome of any recount that the Supreme Court might order." (17)

Parliamentarian's Note: Senator Vance Hartke was challenging the request of his opposing candidate that the state order a recount of the votes cast. Senator Hartke claimed that the recount was barred by article I, section 5 of the Constitution, delegating to the Senate the sole power to judge the elections and returns of its Members. The Supreme Court later held that the constitutional provision did not prohibit a state recount, it being mere speculation to assume that such a procedure would impair the Senate's ability to make an independent final judgment.(18)

17. 117 CONG. REC. 6, 92d Cong. 1st Sess.

18. *Roudebush* v *Hartke,* 405 U.S. 15 (1972). The Supreme Court cited the action of the Senate in seating Senator Hartke, without prejudice to the outcome of the court case, as a basis for declaring the controversy not moot.

Generally, where state law provides a remedy for maladministration of an election, the state may retain jurisdiction over election results until the remedial process has been completed, although the House or Senate may make its own independent judgment (see for example §§ 8.1–8.4, infra, and the cases cited therein). For an occasion where a state court ruled to the contrary, see § 5.2, infra.

19. 116 CONG. REC. 33320, 91st Cong. 2d Sess.

§ 5.2 A Member who had been defeated in a primary election inserted in the Record a state court opinion that the court lacked jurisdiction to pass upon that Member's allegations of election irregularities since the House had exclusive jurisdiction to decide such questions and to declare the rightful nominee.

On Sept. 23, 1970,(19) Mr. Byron G. Rogers, of Colorado, addressed the House in order to insert in the Record a recent opinion of the supreme court of Colorado, holding that the court had no jurisdiction to consider Mr. Rogers' allegations of election irregularities in a primary election where he had been defeated, and that the House had

exclusive jurisdiction to decide such questions.

Parliamentarian's Note: The matter was later investigated by the Committee on House Administration, which did not report to the House thereon. The latter committee found that while there were irregularities in the election, there was no practical way of ascertaining whether they would have changed the result of the primary election.[20]

§ 5.3 To a bill vesting in federal courts jurisdiction over certain voting rights actions, amendments prohibiting preemption of jurisdiction of the state courts over elections in general were held to be germane.

On June 17, 1957, the House was considering H.R. 6127, a civil rights measure. The bill provided that jurisdiction should be vested in federal district courts over certain civil actions for protection of voting rights. An amendment was offered to prohibit preemption of jurisdiction of the state courts over elections. Chairman Aime J. Forand, of Rhode Island, held that the amendment was germane, since it was offered to sections of the bill that have to do with voting, and therefore with elections.[1]

House Construction of State Election Statutes

§ 5.4 In judging the elections of its Members, the House may construe the language of the applicable state election laws and determine the effect of any violations thereof on such an election.[2]

§ 5.5 Where a territorial act passed by Congress required the Governor of the territory to deliver the certificate of election to the Delegate but allowed the territorial legislature power over election laws, a statute of the territory requiring the secretary thereof to declare and certify election results was found controlling in an election contest.[3]

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20. The opinion inserted by Mr. Rogers was later officially reported as *Rogers* v *Barnes*, 172 Colo. 550, 474 P.2d 610 (1970). Compare *Roudebush* v *Hartke*, 405 U.S. 15 (1972), cited at § 5.1, supra.

1. 103 CONG. REC. 9394, 9395, 85th Cong. 1st Sess.

2. See 78 CONG. REC. 8921, 73d Cong. 2d Sess., May 25, 1934. For detailed analysis, see § 7.1, infra, and the precedents referred to therein.

3. Unlike the states, which have power under U.S. Const. art. I, § 4, clause 1 to regulate elections by law, any power of territories and of the seat of

On May 21, 1936, the Committee on Elections No. 2 submitted House Resolution 521 in the contested election case of *McCandless* v *King* for the seat of the Delegate from the territory of Hawaii.(4) The proposed resolution declared Mr. Samuel Wilder King to be duly elected as Delegate. The report analyzed the Hawaiian Organic Act, passed by Congress, to determine whether the contest had been filed within the proper time. The act required the territorial Governor to deliver a certificate of election to the Delegate, but also provided that the election be conducted in conformity with the general laws of the territory and permitted its legislature to amend the election laws.

The committee found that a law of the Hawaiian territorial legislature which required the secretary of the territory to declare and certify election results was controlling as to the question of whether the contestant had filed notice of contest within the time required by law.(5)

government over elections must be delegated by congressional enactment.

4. 80 CONG. REC. 7765, 74th Cong. 2d Sess. The House passed the resolution, without debate, on June 2, 1936, 80 CONG. REC. 8705, 74th Cong. 2d Sess.

5. H. REPT. NO. 2736, Committee on Elections No. 2, 74th Cong. 2d Sess.

State Action Denying Voting Rights

§ 5.6 Where the right of an entire state delegation to take the oath was challenged by a citizens group which claimed systematic denial of voting rights and which held citizen elections, the House affirmed the right of the original delegation to the seats in question.

On Jan. 4, 1965, objection was made to the administration of the oath to the entire delegation of Members-elect from Mississippi. The House then adopted a resolution (H. Res. 1) authorizing those Members-elect to be sworn in.(6)

The challenge to the administration of the oath to the Members from Mississippi was based on the constitutional argument that systematic denial of Negro voting rights throughout the state invalidated the entire election. The citizens group challenging the election had held its own election to choose five representatives.

A formal election contest was instituted but was dismissed by the House on Sept. 17, 1965.(7)

6. 111 CONG. REC. 18–20, 89th Cong. 1st Sess.

7. 111 CONG. REC. 24291, 89th Cong. 1st Sess. For other materials on the challenge, see pp. 18691 (July 29,

§ 5.7 The House refused to overturn an election in a state with a "county unit" primary election system, under which less populous counties were entitled to a disproportionately larger electoral vote than other counties in the same state.

On Apr. 27, 1948, the House adopted without debate House Resolution 553, dismissing the Georgia election contest of *Lowe* v *Davis*.[8]

Parliamentarian's Note: The House thereby refused to invalidate the Georgia "county unit" system for primaries, requiring use of county electoral votes rather than popular votes for choosing nominees. Under that system each candidate was required to receive a majority of county unit votes for nomination, and unit votes were allotted to less populous counties rather than strictly on the basis of population.[9]

1965), 22364 (Aug. 31, 1965), 24263–92 (Sept. 17, 1965).

8. 94 CONG. REC. 4902, 80th Cong. 2d Sess.

9. See the elections committee report in the case, H. REPT. NO. 1823, 80th Cong. 2d Sess. The Supreme Court later invalidated the use of the "county unit" system. *Gray* v *Sanders*, 372 U.S. 368 (1963).

§ 6. Elector Qualifications; Registration

The original Constitution and Bill of Rights left the determination of qualifications required of electors to vote for Members of the House entirely up to the states.[10] At the time of the adoption of the Constitution, qualifications based on status, such as property ownership, were a widespread prerequisite to the exercise of voting rights. Since that time, the power of the states to prescribe the qualifications of electors for Representatives and for Senators[11] has been severely proscribed by constitutional amendments extending the franchise to U.S. citizens without regard to such matters as race, color, or sex,[12] and by federal legislation protecting the integrity of the congressional electoral process.[13]

10. U.S. Const. art. I, § 2, clause 1. See also *House Rules and Manual* §§ 6, 7 (1973).

11. The 17th amendment altered the Constitution in directing the election of Senators by the people of the state, rather than by the state legislatures.

12. See the 15th amendment (race, color, previous condition of servitude); the 19th amendment (sex); the 24th amendment (poll tax); the 26th amendment (age).

13. For a summary of such legislation, see Constitution of the United States